Dissenting Views
H.R. 3824
Threatened and Endangered Species Recovery Act

Enacted in 1973, the Endangered Species Act (ESA) has demonstrated that it is possible to protect our country's heritage and at the same time effectively compete in a global economy. H.R. 3824 will unravel the progress this nation has made in sparing from extinction more than 1,200 species, including the bald eagle and grizzly bear, on their way to recovery, and the brown pelican, American Peregrine Falcon and gray whale, which have recovered.

Those who argue that the law is a failure because it has not recovered more species do not understand that the Endangered Species Act was never intended as a quick fix to protect our favorite species. It is the law of last resort when other state and Federal laws fail to result in species conservation. The true value of the Endangered Species Act lies in the intricacies of life itself.

The Endangered Species Act has been amended several times. There are administrative remedies available to address most, if not all, the reasonable issues that have been raised about the law. But there is no justification for H.R. 3824, except for the expedience of a short-sighted political agenda. H.R. 3824 would establish precedents we strongly oppose.

Pesticide Waiver

H.R. 3824 would repeal the Endangered Species Act provisions that protect threatened and endangered species from the harmful impacts of pesticides. Have we forgotten that it was the pesticide DDT that was largely responsible for the demise of our nation's most enduring symbol, the American bald eagle? Pesticides have also been blamed for poisoning the salmon in the Pacific Northwest, and are suspected of playing a key role in the recent dramatic decline of fish populations in California's San Francisco Bay/Sacramento-San Joaquin Delta.

Yet, H.R. 3824 would insulate those who use pesticides from the Endangered Species Act's prohibitions against killing endangered and threatened species. Additionally, it would waive the requirements in Section 7 of ESA that Federal agencies consult with the National Oceanic and Atmospheric Administration 's National Marine Fisheries Service or Fish and Wildlife Service (Services) to determine the effects that a proposed action may have on listed species. As long as corporations and Federal agencies comply with the Federal Insecticide, Fungicide and Rodenticide Act, they will have no further obligation to meet the requirements in the Endangered Species Act.

Notwithstanding the billions of dollars this country has spent to restore estuaries and waterways, from the Chesapeake Bay to the Everglades and San Francisco Bay/Sacramento-San Joaquin Delta, this provision would lift prohibitions in place to protect drinking water quality, fisheries and wildlife. The economic and environmental implications of this provision are staggering.

Payment for ESA Compliance

Under the misleading label "conservation grants," Section 14 creates a new, potentially open-ended entitlement program for property developers and speculators. Section 14 would establish the dangerous precedent that private individuals must be paid in order to comply with an environmental law designed to protect the public interest in preserving endangered species

Under Section 14, the Services would be put in an untenable position where enforcement of the Endangered Species Act would generate countless compensation claims and virtually unlimited liability against the agencies and Federal taxpayers.

The "takings" clause of the Fifth Amendment to the Constitution states: [N]or shall private property be taken for public use, without just compensation." However, under the provisions of Section 14, property developers would be compensated for government actions which do not constitute takings under the Fifth Amendment. The Majority's intent to disregard the long-standing principles of Fifth-amendment based compensation was made clear by their rejection of Mr. Inslee's amendment.

If the "pay people to comply with the law" language of Section 14 were applied to local zoning, no Mayor or city council could govern a community without facing fear that a decision might drive the community into financial ruin. Among its many flaws, Section 14 redefines "fair market value" to include speculative "business losses" and allows for compensation of "no less than fair market value" even if only a portion of the property is affected by the government action.

Ironically, Section 14 provides no assurance that the new compensation program would lead to greater conservation or recovery of endangered species. The far greater likelihood is an unwarranted windfall for land developers, and speculators, and their lawyers at an enormous cost to the taxpayers and budget deficit.

Alternative Consultation Procedures

H.R. 3824 cuts the heart out of the Section 7 consultation process, the lynchpin of the ESA. H.R. 3824 allows the Secretary of the Interior or Commerce to delegate those responsibilities to other Federal agencies through undefined procedures. Section 12 imposes no standards for these procedures, thus potentially allowing destructive Federal activities to proceed without the normal review by the scientists with wildlife expertise. The only justification given for this provision is that the Services have a heavy workload. This problem could be addressed if additional resources for ESA compliance were allocated to the responsible agencies, a solution repeatedly suggested in testimony before the Committee.

Those tasked with determining the effects of a proposed agency action would be forced to wear blinders when considering whether a species is in jeopardy of extinction. Under existing law, the Services consider the condition of the species at the time the proposed action would be carried out. If other projects are also negatively impacting the species, the Services address their cumulative effects when evaluating whether the species is in trouble. Yet H.R. 3824 forbids the Services from taking these baseline conditions into account. The Services will be obligated to ignore reality and base their decision on fiction. There is a real risk that this provision could allow political expediency to override the concerns of qualified agency scientists.

Once the Secretary of the Interior or Commerce has entered into a cooperative agreement with a State, H.R. 3824 limits the applicability of the Section 7 consultation provisions in the ESA to the time when the agreement is renewed or amended. If it is found that the agreement results in the harm or jeopardy of a listed species, it is questionable whether consultation would have to be reinitiated. There is no requirement that the cooperative agreement meet any meaningful conservation standard.

Jeopardy Definition

While we are highly critical of H.R. 3824, we believe that including a statutory definition of "jeopardize the continued existence" of listed species is a step in the right direction. The existing regulatory definition in 50 C.F.R. 402.02 allows agency actions to proceed unless they impede both the "survival and recovery" of a listed species. This definition allows too many species to totter on the brink of extinction. A species that is merely surviving is clearly not recovering.

The statutory definition of what constitutes jeopardy in H.R. 3824 prohibits any agency action that is likely to make species' conservation significantly less likely in the long-term. The term "long-term" will allow the Secretary to balance the proven long-term benefits of an action intended to promote the species' conservation against potential short term negative impacts in assessing whether jeopardy is likely to occur. For example, prescriptive-burning or other active habitat management may be necessary to ensure a species' conservation in the long-term, even though such management actions may cause short-term adverse impacts to individual members of a species. It is expected that a species' recovery plan, including the identification in such plans of habitat necessary for the conservation of the species, is to factor significantly in making a jeopardy determination during the Section 7 consultation process.

The bill replaces the Secretary's obligation to designate critical habitat for listed species with a new obligation to identify in a species' recovery plan that habitat which is of special value for the conservation of the species. It is expected that an endangered or threatened species' recovery plan, including the identification in such plan of areas of special value to the conservation of the species, will factor significantly in making a jeopardy determination during

the Section 7 consultation process. In the absence of a meaningful recovery plan or criteria or where the Secretary has determined that he or she cannot yet ascertain recovery criteria, the jeopardy analysis shall be informed by the proposed agency action's likely impact on achieving interim recovery criteria, if any, and the extent to which the proposed agency action is likely to impact the species' current status and potential prospects for recovery.

Conclusion

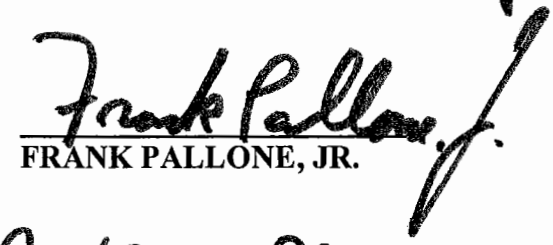
Notwithstanding our support for the inclusion of a statutory definition of jeopardy, we strongly oppose H.R. 3824 which will undermine any progress this country has seen in species recovery. There is no justification to overhaul the law in this way, and its enactment will likely result in more species extinctions and greater costs to the taxpayer.

We cannot know what currently unforeseen miracles of science and medicine reside in the small, seemingly insignificant life forms which surround us. But modern medicine has saved untold numbers of lives by gaining a deeper understanding of life forms. If we wish for human life to continue, we must recognize that our lives are inextricably woven with all other life.

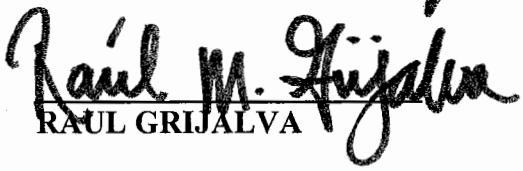
None among us fully understands the complex design of life on earth. Until we do, we should preserve God's wonders in all their forms. It is not for us to decide which pieces of God's plan meet our standards, which should survive, and which should be extinguished for our convenience and pleasure.

NICK J. RAHALL, II

EDWARD J. MARKEY



FRANK PALLONE, JR.

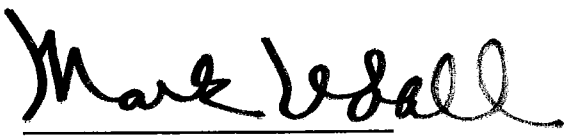


RAUL GRIJALVA

Ron Kind

Ron Kind

Dale E. Kildee



Mark Udall

Tom Udall

George Miller

George Miller

Grace F. Napolitano